No. 06-1168

IN THE

Supreme Court of the United States

BUFFALO TEACHERS FEDERATION, BUFFALO EDUCATIONAL SUPPORT TEAM, NEA NY, TRANSPORTATION AIDES OF BUFFALO, NEA NY, SUBSTITUTES UNITED BUFFALO NEA NY, BUFFALO COUNCIL OF SUPERVISORS AND ADMINISTRATORS, AFSCME LOCAL 264, PROFESSIONAL CLERICAL AND TECHNICAL EMPLOYEES' ASSOCIATION,

Petitioners,

v.

RICHARD TOBE, THOMAS E. BAKER, ALAIR TOWNSEND, H. CARL McCALL, JOHN J. FASO, JOEL A. GIAMBRA, MAYOR ANTHONY MASIELLO, RICHARD A. STENHOUSE, ROGER G. WILMERS, in their official capacities as directors members of the Buffalo Fiscal Stability Authority,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant review on the basis that the United States Court of Appeals for the Second Circuit applied the judicial standard of review outlined by this Court in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), rather than the less deferential standard outlined by this Court in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), where the Second Circuit's decision specifically stated that it was applying, and applied, the standard outlined in *U.S. Trust* and explicitly stated that the impairment was reasonable and necessary even under that less deferential standard of review.

2. Whether this Court should grant review on the basis that the United States Court of Appeals for the Second Circuit applied a different standard of review than that applied by the United States Court of Appeals for the Ninth Circuit in *Continental Illinois National Bank v. Washington*, 696 F.2d 692 (9th Cir. 1983), where both decisions explicitly applied the standard outlined in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), in reviewing state legislative action impairing the contract of a state political subdivision.

PARTIES BELOW AND CORPORATE DISCLOSURE STATEMENT

Respondents, Richard Tobe, Thomas E. Baker, Alair Townsend, H. Carl McCall, John J. Faso, Joel A. Giambra, Mayor Anthony Masiello, Richard A. Stenhouse, and Roger G. Wilmers are all sued in their official capacities as former or current directors/members of the Buffalo Fiscal Stability Authority. The Buffalo Fiscal Stability Authority is a public benefit corporation created by the State of New York.

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INTRODUCTION

Petitioners ask this Court to review a decision of the United States Court of Appeals for the Second Circuit, *Buffalo Teachers Federation v. Tobe*, 464 F.3d 362 (2d Cir. 2006), on the basis that the Second Circuit applied the "deference to [the] legislat[ture]" standard of judicial review outlined in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), rather than the "careful scrutiny"-standard outlined in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) ("*U.S. Trust*"). The Second Circuit's decision is explicit on this issue. The Second Circuit not only applied the less deferential standard outlined in *U.S. Trust,* but found that the BFSA's imposition of the wage freeze was reasonable and necessary under that standard. Petitioners' claim that the Second Circuit applied the wrong standard simply refuses to take the Second Circuit at its word – as expressly stated in the decision, the Second Circuit applied "less deference scrutiny" and found the State action here valid. (Pet. App. 13a). Because the Second Circuit explicitly followed the standard of review outlined by this Court in *U.S. Trust*, there is no basis to grant a writ of certiorari to clarify which standard of review applies. Similarly, because the Second Circuit's decision in this case and the decision of the United States Court of Appeals for the Ninth Circuit in *Continental Illinois National Bank v. Washington*, 696 F.2d 692 (9th Cir. 1983), which is heavily relied upon by the Petitioners, both applied *U.S. Trust*'s "careful scrutiny" standard, there is no conflict between circuit court decisions requiring clarification by this Court. As such, review should be denied.

STATEMENT OF THE CASE

The Buffalo Fiscal Stability Authority ("BFSA") is a public benefit corporation created by the State of New York ("State") to intervene in the City of Buffalo's ("Buffalo" or "City") finances and solve its fiscal crisis. On April 21, 2004, BFSA promulgated a resolution suspending future wage increases of the City's employees and related organizations. The BFSA adopted that resolution (the "wage freeze") based on Buffalo's deteriorating financial condition and its inability to balance its budget as required by the State.

The New York State Legislature enacted the Buffalo Fiscal Stability Authority Act ("Act"), N.Y. Pub. Auth. L. §3850 *et seq.*, in response to the fiscal crisis faced by Buffalo. (A.68, A. 122, Pet. App. 3a).[1] The decision to institute a control board (the BFSA) through the Act was based in large part on the report of the State Comptroller, who was asked to study Buffalo's financial condition by Speaker Sheldon Silver. (A. 183, Pet. App. 2a-3a). In his report, the Comptroller recommended that a control board, whose powers would include the ability to freeze wages, be created to help remedy Buffalo's fiscal woes. (A. 151-52, Pet. App. 3a). The Comptroller had found that the City had been operating with a structural deficit for several years, and was only able to fund its operations with increasing state aid and the use of reserves. (A. 150, Pet. App. 3a).

The City had a combined deficit for the fiscal years 2000-01 and 2001-02 of $23.8 million, and the 2002-03 budget as initially adopted was balanced only by exhausting the City's reserves. The Comptroller projected budget

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[1] References to "A. _____" are references to the Joint Appendix filed on the appeal to the United States Court of Appeals for the Second Circuit.

deficits of $7.5 million for fiscal year 2002-03 increasing to $93-127 million for fiscal year 2006-07. (A.161, Pet. App. 3a).

Due to Buffalo's population decline and poor economy, the Comptroller found that Buffalo's dire situation was not likely to be remedied by the City alone, and the Comptroller concluded that Buffalo was "not currently in a position to address its continuing budgetary imbalance." (A.72, A.150-51, Pet. App. 3a). The Comptroller recommended the creation of a control board – the BFSA – to oversee Buffalo's finances. (A. 151-52, Pet. App. 3a).

In passing the Act, N.Y. Pub. Auth. L. § 3850 *et seq.*, the Legislature found that Buffalo could not remedy its dire financial condition without State assistance, stating that:

> It is hereby found and declared that the city is in a state of fiscal crisis, and that the welfare of the inhabitants of the city is seriously threatened. The city budget must be balanced and economic recovery enhanced. Actions should be undertaken which preserve essential services to city residents, while also ensuring that taxes remain affordable. Actions contrary to these two essential goals jeopardize the city's long term fiscal health and impede economic growth for the city, the region and the state.

(Pet. App. 58a). The Legislature also made a specific declaration in the Act of the need for State intervention. (Pet. App. 59a).

In their Complaint, Petitioners did not challenge the legislature's findings of a fiscal crisis, nor did they directly

challenge the BFSA Act in their Complaint.[2] (*See generally* Complaint, p. 12).

The aim of the Act was to have Buffalo achieve fiscal stability by 2007-08. (*See* N.Y. Pub. Auth. L. §3857[1], Pet. App. 4a). One of the requirements of the Act was for the City to submit to the BFSA each year a financial plan covering a four-year period. (A. 122-23, Pet. App. 4a). The annual financial plans, which require BFSA's approval during what is known as a control period, must contain actions sufficient to ensure that, for each fiscal year of the plan, annual aggregate operating expenses do not exceed annual aggregate operating revenues. Through these financial plans, the Act required Buffalo to begin to close its budget gaps starting in 2003 and balance its budget without BFSA assistance by fiscal year 2007-08. (A. 70, 122-23, Pet. App. 4a). The Act requires Buffalo to take corrective action should its revenues or expenses deviate from the amounts projected in those plans. If the City is unable to, or is unwilling to, take such actions, the BFSA is authorized to impose a financial plan of its own. (A. 70, Pet. App. 4a). The BFSA may impose a wage and/or hiring freeze upon the finding that such a freeze is "essential to the adoption or maintenance of a city budget or financial plan" that is in compliance with the Act. (Pub. Auth. L. § 3858[2][c][i], Pet. App. 4a). Both the New York Comptroller and the New York Division of the Budget recommended that the BFSA be granted such powers to enforce the provisions of the Act. (A. 73, A. 189, A. 190-92, Pet. App. 4a).

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[2] The District Court had found that the Complaint lacked a constitutional challenge to the BFSA's authority to institute a wage freeze, but decided to address the Petitioners' constitutional claims nonetheless believing that the BFSA had sufficient notice of their contentions regarding the constitutionality of the Act. (Pet. App. 32a-33a).

On October 21, 2003, the BFSA approved the City's first four-year financial plan under the Act. (Pet. App. 4a). The plan assumed BFSA deficit financing for the City and the School District of $57.7 million over the four years of the plan. (A. 75). The City approved a tax increase for its 2004-05 budget and planned for another tax increase in the last year of the four-year plan. (A. 79, Pet. App. 5a). After the plan was approved, Buffalo experienced unexpected shortfalls much greater than those projected – as of April 2004, the City's projected gap for the 2004-05 fiscal year increased by $20 million over the budget gap projected in the financial plan approved by the BFSA and the projected cumulative gap for the City alone was $250 million over the duration of the revised plan. (A. 76-77, Pet. App. 5a). Additionally, during the 2003-04 fiscal year, Buffalo anticipated a severe cash flow problem such that the City Comptroller borrowed $120 million for cash flow purposes. (A. 77).

On April 21, 2004, the BFSA invoked its wage freeze power and determined that "a wage freeze, with respect to the City and all Covered Organizations, is essential to the maintenance of the Revised Financial Plan and to the adoption and maintenance of future budgets and financial plans that are in compliance with the Act." (A. 145, Pet. App. 5a). The wage freeze took effect that day.

The members of the petitioning unions were all parties to collective bargaining agreements with the Buffalo School District that had expired. These expired agreements, which remained in full force and effect by virtue of New York's Taylor Law, provided for periodic step increases, longevity increments and/or shift differentials in the salaries to be paid to the covered employees which were reflected in the salary schedules contained in each of the collective bargaining agreements. The resolution only froze those

salary step ups that were to have taken effect on or after April 21, 2004. (A. 61-66, 146, Pet. App. 14a). The wage freeze was designed to remedy the City's fiscal crisis and prevent an unacceptable reduction in the services to the students of the school district by preventing layoffs and cuts in programs. (A. 81).

Based on these facts, the Second Circuit found that the wage freeze was reasonable and necessary "even under the less deferential standard" outlined in *U.S. Trust*, 431 U.S. 1. (Pet. App. 12a). In applying the factors outlined in *U.S. Trust* to evaluate a state's impairment of a state subdivision's contracts, the Second Circuit found that, in imposing the freeze, the BFSA had not: 1) considered impairing the contracts at issue "on par with other policy alternatives," 2) imposed a "drastic impairment when an evident and more moderate course would serve its purpose equally well," nor 3) "act[ed] unreasonably in light of the surrounding circumstances." *Id.* (citing *U.S. Trust*, 431 U.S. at 30-31).

REASONS FOR DENYING THE PETITION

A. The Second Circuit Explicitly Stated That It was Following the Standard Outlined in *U.S. Trust* and Held that the Wage Freeze was Valid under that Less Deferential Standard of Review.

Petitioners ask this Court to review the Second Circuit's decision based on their claim, which is unsupported by the text of the decision itself, that the Second Circuit failed to apply the "careful scrutiny" standard of judicial review outlined in *U.S. Trust*, 431 U.S. 1. Although the Petitioners claim that the standard of review is dispositive of the issues, the outcome in this case does not depend on the

standard of review applied because the Second Circuit held that the wage freeze was reasonable and necessary under the less deferential standard. As stated by the Second Circuit: "For the purposes of this appeal, we need not resolve what level of deference to apply. Instead, we will assume that the lower level of deference [outlined in *U.S. Trust*] applies because, as discussed below, the wage freeze is reasonable and necessary even under the less deferential standard." (Pet. App. 12a). As such, certiorari should not be granted because the result in this case does not depend on the standard used.

Furthermore, the Petitioners' claim that the Second Circuit improperly applied the "deference to [the] legislat[ure]" standard applicable to private contracts under *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) ("*Blaisdell*"), rather than the higher level of scrutiny outlined in *U.S. Trust*, is contradicted by the language of the Second Circuit's decision. The court noted the difference between the standards outlined in *Blaisdell* and *U.S. Trust*: "Public contracts are examined through a more discerning lens. When the state itself is a party to a contract, 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the [s]tate's self-interest is at stake...." (Pet. App. 10a [citing *U.S. Trust*, 431 U.S. at 26]). In citing its own decision in *Condell v. Bress*, 983 F.2d 415, 418 (2d Cir. 1993), the Second Circuit noted that when a state's legislation is self-serving and impairs the obligations of its own contracts, "courts are less deferential to the state's assessment of reasonableness." (Pet. App. 12a).[3]

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[3] Petitioners claim that the Second Circuit's decision missed the point "that state legislative action impairing a state political subdivision's contractual financial obligations — like state legislative action impairing a State's own contractual financial obligations — is by its nature inherently legislative action in the impairing State's 'self-interest.'" (Pet.

After recognizing these principles, the Second Circuit applied the lower level of deference, "assuming that the state's legislation was self-serving to the state." Therefore, it was "less deferential to the state's assessment of reasonableness and necessity than [it] would be in a situation involving purely private contracts...." (Pet. App. 12a). Again stating that it was applying "less deference scrutiny," the Second Circuit applied factors outlined in *U.S. Trust* in analyzing the wage freeze:

> Ultimately, for impairment to be reasonable and necessary under *less deference scrutiny*, it must be shown that the state did not: (1) "consider impairing the...contracts on par with other policy alternatives" or (2) "impose a drastic impairment when an evident and more moderate course would serve its purpose equally well," nor (3) act unreasonably "in light of the surrounding circumstances," *U.S. Trust Co.*, 431 U.S. at 30-31.

(Pet. App. 13a [emphasis in original]).

18-19). The Second Circuit clearly addressed this issue, stating that "[d]efendants ignore that a public contract is in fact being impaired albeit through state rather than local law. Were we to adopt defendants' reading, state legislatures could delegate to an agency the power to impair a public contract of a government subdivision that the subdivision itself would have more difficulty impairing. ... We decline to open such an end-run around Contracts Clause law." (Pet. App. 11a). Furthermore, although the Second Circuit found that the impairment in this case was not "welching" as was the legislation in *Association of Surrogates & Supreme Court Reporters v. State of New York*, 940 F.2d 766 (2d Cir. 1991), the Court nevertheless assumed the lower level of deference applied as if the State's legislation were in fact self-serving. (Pet. App. 11a-12a).

With the *U.S. Trust* standard "in mind" (Pet. App. 13a), the Second Circuit found that the wage freeze was reasonable and necessary to serve an important public purpose. The legislature and the BFSA did not treat the wage freeze on par with other policy alternatives –it could be enacted only if essential to maintenance of the City's budget or financial plans. N.Y. Public Auth. L. § 3858(2)(c)(i). The Second Circuit found that the BFSA had imposed the freeze only after other alternatives had been considered and tried, including a hiring freeze and cost-cutting measures such as school closings and layoffs. "Only after these more drastic steps were taken and a finding that the freeze was essential was made, did the BFSA institute the wage freeze." (Pet. App. 13a-14a).

The Second Circuit also relied upon the prospective and temporary nature of the wage freeze in determining that it was reasonable, one of the factors specifically enumerated in *U.S. Trust.* (Pet. App. 14a ["The Supreme Court instructs that the extent of the impairment is 'a relevant factor in determining its reasonableness.' *U.S. Trust*, 431 U.S. at 27."]). The wage freeze, which the court characterized as a "relatively minimal" impairment, was both prospective and temporary because it had to be revisited on an ongoing basis to assure its necessity and did not affect past salary due for labor already rendered or money invested. (Pet. App. 14a). "It only suspend[ed] temporarily the two percent increase in salary for services *to be* rendered." (Pet. App. 14a [emphasis in original). Furthermore, in addition to the factors noted by the Second Circuit, the contracts at issue were expired and continued in effect only by virtue of state law.

The Second Circuit rejected Petitioners' argument that the wage freeze was unnecessary because other alternatives existed, such as raising taxes or eliminating other programs. The Second Circuit found that, while taxes could

always be raised, that is not the only permissible response that a legislature could take. Further, Buffalo had already increased its taxes and any further increase would have exacerbated its financial condition. Even if the State had raised taxes, such monies would not necessarily have benefited Buffalo.[4] The Second Circuit did not believe it was necessary to second-guess the decision to utilize a wage freeze instead of other policy alternatives. (Pet. App. 15a).

Because the Second Circuit clearly applied, and stated it was applying, the standard in *U.S. Trust,* Petitioners' contention that it applied the wrong standard is clearly without merit. Indeed, the Petitioners never contended in their petition for rehearing *en banc* that the Second Circuit had not applied the standard in *U.S. Trust.*

Indeed, Petitioners' claim that the Second Circuit applied the more deferential standard of review outlined in *Blaisdell* takes portions of the Second Circuit's decision out context. The Second Circuit referenced (as a "*see*" rather than as direct authority) *Blaisdell*,[5] *Local Div. 589, Amalgamated Transit Unions v. Massachusetts*, 666 F.2d

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[4] Furthermore, as Respondents argued below, the State did not save itself money by imposing the wage freeze because it was not a party to the contracts at issue and in any event had no duty to provide aid to Buffalo or to fund any of its expenses. (Respondents' Brief to the Second Circuit Court of Appeals, at pp. 35-46).

[5] Under both *Blaisdell* and *U.S. Trust*, the question is whether a contractual impairment is reasonable and necessary to serve an important public purpose. While the standard of deference applied properly depends on whether the contract is private (*Blaisdell*) or public (*U.S. Trust*), both decisions of this Court address whether an impairment is "reasonable and necessary." Indeed, Petitioners point to another instance where the Second Circuit cited *Blaisdell*, which simply supports its determination that the wage freeze was not a subterfuge and had an adequate basis. (Pet. App. 17a).

618, 643 (1st Cir. 1981) (Breyer, J.) ("*Local Division 589*"),[6] and *Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 54 (2d Cir. 1998), for the proposition that, "on the undisputed facts of this case," it should not "second-guess the wisdom of picking the wage freeze over other policy alternatives, especially those that appear more Draconian, such as further layoffs or elimination of essential services." (Pet. App. 15a). Citation of those authorities does not demonstrate that the Second Circuit failed to apply *U.S. Trust*. The proposition outlined in those cases – that the Court should not analyze the policy alternatives – is wholly consistent with the *U.S. Trust* standard, which states: "[a]s is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." (431 U.S. at 22-23).

Indeed, the Second Circuit cited *Local Division 589*, 666 F.2d at 643, for the proposition that "less deference does not imply no deference," but that, consistent with *U.S. Trust*, it need not review the legislation *de novo*. (Pet. App. 12a). Consistent with those principles, the court noted that, although it was to apply a "heightened scrutiny" to the State's action in this case, it should not apply "strict scrutiny" and decide, as did *Lochner v. New York*, 198 U.S. 45 (1905) and its progeny, to "overturn[] laws as unconstitutional when they 'believe[d] the legislature [] acted unwisely.'" (Pet. App. 12a [citing *Ferguson v. Skrupka*, 372 U.S. 726, 730 (1963)]). Strict scrutiny is not

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[6] This case also applies the *U.S. Trust* standard. *Id.* at 641-62 (citing *U.S. Trust*, noting that the review of public contracts does not give "complete deference" to the legislature and stating that the "very existence, and nature of the complex factual controversies revealed in the record before us here support the legislature's judgment even without 'complete' deference.").

the standard of review that this Court established in *U.S. Trust*.

In addition to arguing that the Second Circuit refused to apply the *U.S. Trust* standard, Petitioners argue that it also failed to apply a second standard which they characterize as the "especially vigilant" standard outlined in *Association of Surrogates & Supreme Court Reporters v. State of New York*, 940 F.2d 766 (2d Cir. 1991) ("*Surrogates*") and *Condell v. Bress*, 983 F.2d 415 (2d Cir. 1993) ("*Condell*"). (Pet. App. 8). Petitioners did not assert on appeal before the Second Circuit or in seeking a rehearing that "highly vigilant" was a separate standard that should be applied. Indeed, the term "especially vigilant" was not used in *U.S. Trust*, but was referenced in *Surrogates*, which, quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978) ("*Spannaus*"), simply notes that the Contract Clause "is especially vigilant when a state takes liberties with its own obligations." 940 F.2d at 773-74. This is not a separate standard from that outlined in *U.S. Trust.* – indeed, both *Condell* and *Surrogates* were simply applying the standard outlined in that case. Further, as noted by Petitioners, a standard derived from *Spannaus* would be improper to use in this case because *Spannaus* applies to private, not state contracts. (*See* Pet. App. 18).

In any event, as outlined above, the Second Circuit did not reject the standard set forth in *U.S. Trust*, *Condell* and *Bress* – it expressly applied the *U.S. Trust* standard, but correctly declined to reach the same result as in *Condell* and *Surrogates* because the "facts and circumstances of those cases … are dissimilar to those present here…." (Pet. App. 16a). The parties in this case conceded that Buffalo was in a fiscal crisis and, as noted by the Second Circuit, "there is no evidence in the record of an ill-motive of political expediency or unjustified welching." (Pet. App. 16a). By

contrast, "[t]hat there was an emergency or dire need justifying the impairment was in doubt in [*Condell* and *Bress]*." (Pet. App. 16a). In *Surrogates*, 940 F.2d 773, the Second Circuit assumed that expansion of the judiciary was an important public purpose, but held that a payroll lag was not necessary in achieving that goal. In *Condell*, 983 F.2d at 420, the Second Circuit found that there was not a sufficient emergency to justify a payroll lag.

In evaluating this case, the Second Circuit found persuasive the New York Court of Appeals decision in *Subway-Surface Supervisors Association v. New York City Transit Authority*, 44 N.Y.2d 101, 107-08, 404 N.Y.S.2d 323, 326-27, 375 N.E.2d 384, 387 (1977). In that case, the court upheld the constitutionality of the Financial Emergency Act for the City of New York, a law which suspended the wages of municipal workers. That case was similar to the case at bar because the fact of the emergency was not contested. (Pet. App. 17a). Indeed, Petitioners have failed to show that the freeze is not a reasonable and necessary means to solve the City's fiscal crisis, and have provided no reasons why *Condell* and *Surrogates*, which did not present an emergency impacting the safety and health of State citizens, should control here.[7]

Because the Second Circuit applied *U.S. Trust* in ruling on Petitioners' claims, the writ should be denied because the decision here was made in conformity with the correct standard outlined by this Court. Review is

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[7] Petitioners' argument that the Second Circuit's decision will open a "welcoming door to self-interested state legislative action impairing state political subdivision contractual financial obligations" overstates their case. (Pet. App. 10). The Second Circuit has found, on a narrow set of facts, that Buffalo's financial emergency justifies a wage freeze. That decision is not a green light for states to begin impairing contracts absent a fiscal crisis.

unnecessary because the Second Circuit found that the wage freeze was reasonable and necessary even assuming that the State legislation was self-serving.

B. Because the Second Circuit Applied the Standard Set Forth in *U.S. Trust*, the Decision In This Case Does Not Conflict With The Ninth Circuit's Decision in *Continental Illinois*.

As noted above, the Second Circuit applied, and explicitly stated it was applying, the less deferential standard outlined in *U.S. Trust* in ruling on the impairment in this case. As such, its decision does not conflict with that of the United States Court of Appeals for the Ninth Circuit in *Continental Illinois Bank v. Washington*, 696 F.2d 692 (9th Cir. 1983) ("*Continental Illinois*"). Indeed, Petitioners did not cite this case to the Second Circuit on their initial appeal from the District Court, nor did they argue in seeking an *en banc* rehearing that the Second Circuit's decision conflicted with that in *Continental Illinois*. Further proof that the circuits are not in conflict is the decision of the United States Court of Appeals for the Fourth Circuit in *Baltimore Teachers Union, American Federation of Teachers Local 340 v. Mayor & City Council of Baltimore*, 6 F.3d 1012 (4th Cir. 1993), where the court applied *U.S. Trust* to find that a wage freeze did not violate the Contract Clause.

A review of *Continental Illinois* demonstrates that the decision here does not conflict with the Ninth Circuit's view of the standard of review. In that case, the Ninth Circuit ruled on the constitutionality of state legislative action impairing the contract of a state political subdivision using the *U.S. Trust* "careful scrutiny" standard of review. Furthermore, and perhaps this is why the Petitioners did not cite this decision below, the Ninth Circuit found that there was no attempt to use the State's police power to justify the

impairment: "the state has not attempted to justify Initiative 394 as an exercise of the State's sovereign prerogative to protect the health and safety of its citizens. Considerations of health and safety did not give rise to the Initiative and are not offered in justification of it." 696 F.2d at 701. Indeed, the purpose of the statute was to increase public accountability and protect the state's finances by placing controls on the entities' spending, precisely the type of conduct deemed not to support an impairment in *Condell* and *Surrogates*. The holding in *Continental Illinois* has no application here, where there is a declared fiscal crisis affecting the health and welfare of the citizens of Buffalo.

Because the Second, Fourth and Ninth Circuits have consistently applied the less deferential standard outlined in *U.S. Trust* to evaluate the state impairment of the contracts of a state subdivision under the Contract Clause, it is not necessary for this Court to clarify the standard of review. Therefore, review should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: March 28, 2007

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